

the provisions of the Administrative Procedure Act would tend to require public disclosure of such information if it was to be considered by the FCC in ruling upon the CPUC Petition, it was sadly derelict in evaluating the competitive harm its actions could bring to the cellular carriers. However, the forthright denial of the CPUC that it has any "independent interest in continuing to treat any of this information as confidential"<sup>18</sup> would indicate that the CPUC intentionally placed confidential information before the FCC in anticipation that the Commission's procedures would require a public disclosure of the information. If the CPUC has abdicated its responsibility as custodian of confidential information to safeguard the legitimate interests of those who have provided the information, the FCC should at least allow those parties--the cellular carriers--to protect their own interests.

As a result, the proposed protective order must be revised to explicitly recognize the interests of the cellular carriers in the confidentiality of the information they have submitted to the CPUC and which has been appended to the CPUC Petition. Accordingly, paragraph 8 of the proposed protective order should be modified to explicitly disclaim any waiver of carriers' rights, as opposed to a reference to the rights of "any other party". Consistent with a recognition of the carriers' interests is the granting of sufficient ability to

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<sup>18</sup> See "Opposition of California to Motion to Reject Petition or, Alternatively, Reject Redacted Information", filed on September 26, 1994, at p. 4.

defend those interests. Thus, paragraph 9 should be modified to provide that, in addition to the CPUC, the cellular carriers are able, without prejudice, to apply for additional protection for the confidential information. It should also be understood that the ability to seek additional protections provided in paragraph 9 will be meaningless unless the carriers are served with executed copies of all non-disclosure agreements and sealed versions of all pleadings containing confidential information.

**H. The Proposed Protective Order Does Not Spell Out the Terms of the Non-disclosure Agreement Which must Be Executed Before Confidential Information Is Provided to a Third Party**

The FCC should not adopt any proposed protective order until the terms of a carefully drawn and enforceable non-disclosure agreement is agreed upon and submitted to the Commission to take the place of the attorney application for access contemplated by the proposed protective order. This non-disclosure agreement will have to contain the provisions discussed above relating to sworn statements of eligibility and acknowledgement of the ban on improper use of the data.

Until such a document has been drafted, served upon the parties, and modified through negotiations, it would be quite improper to issue a protective order or contemplate the release of any of the confidential information to any parties. If, and only if, the FCC determines that release of some or

all of the confidential data is necessary, the CCAC will participate in the amendment of the proposed protective order and the development of the necessary non-disclosure agreement. However, as indicated above and explained in more detail below, the CCAC does not believe that the release of the carrier specific information is necessary to properly adjudicate the CPUC's Petition.

#### **IV. The CPUC Should Withdraw The Remaining Redacted Information**

It is important for the FCC to consider the purpose for which the CPUC has offered the large quantity of redacted material in this proceeding. The CPUC must provide evidence or information to substantiate its assertion that market conditions in California fail to protect cellular customers from unfair or unreasonable rates.<sup>19</sup> The Commission must understand that it need not risk procedural error in disclosing such confidential information because the vast majority of the confidential customer specific information submitted by the CPUC is not even mentioned in its Petition. The CPUC has, almost exclusively, referred to aggregate market data in the text of its Petition.<sup>20</sup> The few direct references to carrier specific market share or capacity utilization

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<sup>19</sup> Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6006(b)(2)(A), § 6002(b)(2)(B), 107 Stat. 312, 392 (1993); 47 U.S.C. 332(c)(3).

<sup>20</sup> See, for example, CPUC Petition at pp. 30-35, 51, 53.

hardly appear so vital as to warrant adoption of the elaborate protective orders discussed above.<sup>21</sup> If the FCC can examine cellular rate trends and subscriber trends in California on an aggregated basis, either market by market or on a state-wide basis, it can thereby avoid compromising confidential proprietary information pertaining to individual cellular carriers. The CCAC strongly urges the FCC to direct the CPUC to negotiate with the parties a means to permit the public disclosure of aggregated information and the withdrawal of carrier-specific information from the CPUC Petition.<sup>22</sup>

The CCAC feels compelled to point out once more that the information sought by NCRA is not essential to the FCC's determination of the merits of the CPUC Petition. This is because not one party, including NCRA, sought to obtain the confidential information submitted under seal by the CPUC to prepare their response to the CPUC's initial Petition. NCRA did not seek access to the redacted information until the very day it filed its Response. Nor did NCRA claim in its response that lack of access to this information has prejudiced its

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<sup>21</sup> See CPUC Petition at pp. 29, 52, 53.

<sup>22</sup> It must be understood, however, that the investigative material obtained from the Attorney General, which appears to be entirely carrier-specific, is not susceptible to modification so as to disguise its proprietary character, and cannot be made public under any circumstances. The FCC must exclude this material from the record in this proceeding in any event.

ability to respond to the CPUC.<sup>23</sup> The reason for this is self-evident. The CPUC has not claimed that only certain markets or certain carriers within California are charging unreasonable rates. The CPUC has condemned the entire California cellular industry in its petition<sup>24</sup> and has made very little reference to carrier-specific statistics. It makes little sense, therefore, for the FCC to waste either its resources or the time allotted to it under statute to rule upon this Petition in a prolonged fight over pages and pages of carrier-specific subscriber and capacity utilization data which is never referred to in the CPUC Petition. The CCAC has analyzed the California market on the basis of aggregated data, and has separately analyzed large, medium and small markets, and high, medium and low volume customers' rates

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<sup>23</sup> NCRA merely claimed in a footnote that it "reserved the right" to file additional comments after obtaining access to the sealed material, without any justification for claiming such a right under FCC procedures. Altruistically, NCRA claimed it was filing its motion to unseal the redacted material "for the benefit of participating parties." None of this constitutes a showing of need by NCRA or any other party sufficient to overcome the carriers' interest in preventing disclosure of confidential proprietary information. Comments of NCRA, filed September 19, 1994, FCC PR File No. 94-SP3.

<sup>24</sup> It is worth remembering that the cellular resellers upon which the CPUC places such high hopes charge rates which very closely track those of the facilities-based carriers. Therefore, if the CPUC criticizes the licensed carriers' rates as unreasonable, the criticism applies to all rates in California.

without compromising any carriers' proprietary information.<sup>25</sup> The CPUC can and has done the same.<sup>26</sup> As a result, it need not attempt to force the public disclosure of confidential carrier-specific information in order to make its case before the FCC.

#### **V. Conclusion**

CCAC respectfully requests that the Commission deny the NCRA Request for release of confidential data, and decline to issue a protective order in this case. However, in the event that the FCC opts to release any or all of the above-described confidential data, the CCAC urges that the proposed protective order drafted by the Private Radio Bureau be modified as described herein to strictly control the terms of such disclosure. In any case the CCAC strongly urges the FCC to

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<sup>25</sup> See "Response of the Cellular Carriers Association of California Opposing the Petition of the Public Utilities Commission of the State of California to Retain State Regulatory Authority over Intrastate Cellular Service Rates", filed September 19, 1994 in FCC PR File No. 94-SP3, redesignated PR Docket No. 94-105, at Appendix B.

<sup>26</sup> See references to aggregated data at pages 30-35, 51, and 53 of the CPUC Petition.

exclude from the public record in this proceeding any portion of the investigative material obtained by the CPUC from the Attorney General.

Respectfully submitted,

WRIGHT & TALISMAN

By Michael B. Day  
Michael B. Day *pm*  
Jeanne M. Bennett  
Jerome F. Candelaria

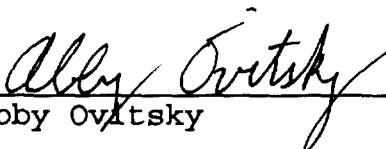
Shell Building  
100 Bush Street, Ste. 225  
San Francisco, CA 94104  
Telephone: (415) 781-0701

Attorneys for the  
Cellular Carriers  
Association of California

October 7, 1994

CERTIFICATE OF SERVICE

I, Abby Ovitsky, hereby certify that on this 7th day of October 1994, a true and correct copy of the foregoing **COMMENTS OF THE CELLULAR CARRIERS ASSOCIATION OF CALIFORNIA ON THE PROTECTIVE ORDER PROPOSED TO PROVIDE ACCESS TO CONFIDENTIAL INFORMATION CONTAINED IN THE CALIFORNIA PETITION FOR STATE REGULATORY AUTHORITY** was mailed first class, postage prepaid to the parties listed on the attached service list.

  
\_\_\_\_\_  
Abby Ovitsky



PR Docket No. 94-105  
PR file No. 94-SP3  
rev. 9/28/94

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## **APPENDIX A**

TRP/rmn

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## BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's	)	
Own Motion into Mobile Telephone	)	I.93-12-007
Service and Wireless Communications.	)	

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**ADMINISTRATIVE LAW JUDGE'S RULING**  
**DIRECTING PARTIES TO PROVIDE SUPPLEMENTAL INFORMATION**

As directed by the Commission's Order Instituting Investigation (OII) in the above-captioned matter, parties provided initial comments on February 25, 1994 and reply comments on March 18, 1994.

Regarding the scheduling of further action following receipt of the filed comments, the OII states that:

"[T]he assigned Commissioner may work with the assigned administrative law judge to identify issues in this OII which should be dealt with on a separate and expedited track for the purpose of meeting [Federal Communications Commission] FCC filing requirements ... for the purpose of retaining [CPUC] authority over the regulation of the cellular industry." (Page 35.)

Accordingly, the schedule for this proceeding shall be divided into two phases. The initial phase shall consider whether current market conditions in the mobile telephone industry protect subscribers adequately from unjust, unreasonable, or discriminatory rates. The Commission shall issue an interim opinion addressing this question on an expedited basis in time to meet the FCC filing deadline for state agency petitions to retain regulation over the cellular industry after August 10, 1994.

Depending on our findings as to industry competitiveness and the need to petition the FCC for continued regulatory jurisdiction over the cellular industry, further action will be taken to address the "Proposed Policies Governing Mobile Telephone Services" as enumerated in Appendix B of the OII. A separate

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ruling will be issued addressing this second phase of the proceeding.

The OII further states:

"Upon receipt of comments, for those issues involving disputed factual matters, the Commission may conduct evidentiary hearings. The Commission may issue interim rulings or decisions to guide parties for further comments or to dispose of matters ready for early resolution." (Page 35.)

A number of the parties contend that evidentiary hearings are required before the Commission can issue a decision in this proceeding. Other parties contend that evidentiary hearings are not needed and that a Commission decision can be issued based upon the comments which have been filed.

For purposes of at least the initial phase of the proceeding limited to industry competitiveness and the need for continuation of state regulation of cellular carriers, it is not expected that hearings will be required. While the comments reflect a range of divergent opinions, they generally provide a responsive framework upon which the Commission can prepare an interim opinion. Yet, certain additional information is needed regarding whether competition can be relied upon to protect consumers from unjust or discriminatory pricing.

Accordingly, this interim ruling provides guidance regarding certain additional information needed to examine industry competitiveness. The additional information sought is directed to the limited parties as identified below. The parties identified are to provide the requested information by April 29, 1994.

IT IS ORDERED that:

1. The following information shall be provided by the parties as identified below no later than April 29, 1994:

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**A. Wholesale Price Competition**

Appendix A - Question 4 of the OII asked parties to comment on this order's characterization of competition in the mobile telephone market at the wholesale level. While various parties addressed retail prices, additional information is required to assess wholesale competition.

Each of the cellular carriers identified below are hereby directed to provide the following information with respect to their operation in the listed Metropolitan Statistical Areas (MSA) and Regional Statistical Areas (RSA). A set of blank data response forms is attached hereto to facilitate uniform preparation of responses.

Cellular carriers that are required to respond to the data request:

1. Los Angeles MSA (Los Angeles, Orange, Riverside, and San Bernardino Counties):

Los Angeles Cellular Telephone Company  
Los Angeles SMSA

2. Bay Area MSA (Alameda, Contra Costa, Marin, San Francisco, San Mateo, and Santa Clara Counties):

Bay Area Cellular Telephone Company  
GTE Mobilnet Limited Partnership

3. Sacramento MSA (Placer, Sacramento, and Yolo Counties):

Sacramento Cellular Telephone Company  
Sacramento Valley Ltd Partnership

4. San Diego MSA (San Diego County):

U.S. West Cellular  
AirTouch Cellular

5. Santa Barbara MSA (Santa Barbara County):

Santa Barbara Cellular  
GTE Mobilnet Ltd Partnership

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6. Fresno MSA (Fresno County)

Fresno Cellular Telephone Company  
Fresno MSA Ltd. Partnership

7. California 2 (RSA 2) (Modoc, Lassen, and  
Plumas Counties):

California 2 Cellular Corporation  
Modoc RSA Ltd Partnership)

8. California 7 (RSA 7) (Imperial County):

Century El Centro Cellular Corporation  
Contel Cellular, Inc.

Questions:

1. Provide total number of activated wholesale cellular telephone numbers (units) at the end of each year for the last five years, inclusive for 1989 - 1993. Break-down wholesale units into facilities-based retail operations, resellers, master volume users, and governmental agencies. For each of the above classifications provide total number of units based on the following usage categories in minutes of use: 0 - 60, 61 - 120, 121 - 480.

2. Provide number of wholesale units on "Basic Plan," or equivalent service plan, for the last five years (1989-1993, inclusive), broken down into facilities-based operations and resellers. Show billed rate for each classification in dollar(s) per minutes of usage based on 60, 120, and 480 minutes of use per month. In addition, separately identify the access charge for each classification. Assume minutes of use are divided 80% peak and 20% off-peak use.

3. Provide total number of units on each plan other than basic or its equivalent for the last five years (1989-1993, inclusive). Separately report contractual plans that require customers to stay on the same service plan for one or more years. Units should be broken down into facilities-based operations, resellers, master volume users, and governmental agencies. Show

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monthly customer bill in dollar(s) per minutes of usage based on 60, 120, and 480 minutes of use per month. In addition, separately identify the access charge for each classification. Assume minutes of use are equally divided between 80% peak and 20% off-peak use.

Documents, workpapers, reports, or any other source of information on which responses are based may be required by the Commission staff to clarify or substantiate responses.

**B. Cellular Carriers Association of California Rate Study**

The Cellular Carriers Association of California (CCAC) presented a rate comparison study on page 20 of their initial comments. CCAC shall provide the following additional information with respect to the rate study.

1. Identify by name the cellular carriers included in the study. Where different carriers were included in some years but not others, so identify.
2. Provide for each of the cellular carriers included in the study the raw data used to compute the average cost per minute of usage for each "optimal rate plan" included in the study. The raw data should be provided in computer-readable format.
3. Were the terms offered by each carrier under its "optimal rate plan" consistent from year to year of the study? To the extent the answer is "no," please indicate by carrier and year where the terms of the plan changed and what those changes were.
4. Describe what terms and conditions generally were required to receive service under the "optimal rate plans" with respect to minimum duration, minimum usage, or penalties for early cancellation.
5. Of the subscribers under discounted rate plans in Charts H-J, for each year and subcategory of size and usage identified:
  - (a) What percentage of subscribers received service under the "optimal plan" as identified in Charts E-G?
  - (b) What was the average cost per minute of usage for customers under discounted rate

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plans who did not receive service under the "optimal" plan?

- (c) What was the average cost per minute of usage for customers under basic undiscounted rate plans?

C. Nationwide Cellular Services, Inc. Study

Nationwide provided as its comments two papers authored by Thomas W. Hazlett, Ph.D (Hazlett). The second of the two papers is a rebuttal to a critique of the first Hazlett paper. The critique by John Haring (Haring) and Charles Jackson (Jackson), "Errors in Hazlett's Analysis of Cellular Rents," is referenced, but not provided in Nationwide's comments. In order to provide a complete context for understanding the Hazlett papers, Nationwide is directed to provide a copy of the Haring and Jackson paper.

Nationwide should also provide the following:

1. Congressional Budget Office Report "Auctioning Radio Spectrum Licenses" (March 1992) referenced in footnote 13 of the Hazlett paper.
2. 1992 FCC Study prepared by David Reed: "Putting it all Together: The Cost Structure of Personal Communications Services" referenced in footnote 79, page 36 of Hazlett's second paper.
3. 1992 Kwerel & Williams Study referenced in footnote 80 of the Hazlett paper.

Dated April 11, 1994, in San Francisco, California.

/s/ THOMAS R. PULSIFER  
Thomas R. Pulsifer  
Administrative Law Judge



Number of Units												
Retail Operations			Resellers			MVU*			Govn't Use			
0-60	61-120	121-480	0-30	31-120	121-480	0-60	61-120	121-480	0-60	61-120	121-480	
9												
10												
11												
12												
13												
No Plan or Equivalent												
Number of Units												
Retail Operations			Resellers									
0-60	61-120	121-480	0-60	61-120	121-480							
14												
15												
16												
17												
18												
19												

	\$/MOU															
	Retail Operations			Access Resellers			Access									
0	60	120	480	Charge	60	120	480	Charge								
9																
0																
1																
2																
3																
If access charges vary with quantities of usage, show amounts.																

Name of plan:												
Number of Units			Resellers			MVU*			Gov't Use			
Retail Operations			Resellers			MVU*			Gov't Use			
0 - 60	61 - 120	121 - 480	0 - 60	61 - 120	121 - 480	0 - 60	61 - 120	121 - 480	0 - 60	61 - 120	121 - 480	
89												
90												
91												
92												
93												
\$/MOU			Access			MVU*			Access			
Retail Operations			Resellers			MVU*			Gov't Use			
0 - 60	61 - 120	121 - 480	Charge	60	120	480	Charge	60	120	480	Charge	
89												
90												
91												
92												
93												

Make as many copies of this form as needed to include all plans.

PR-12-94 TUE 16:57 STEVE CARLSON@AS500

Contractual Plans																
Required years of contract		1														
Number of units																
Retail Operations		Resellers			MVU*			Gov't Use								
0 - 60	61 - 120	121 - 480	0 - 60	61 - 120	121 - 480	0 - 60	61 - 120	121 - 480	0 - 60	61 - 120	121 - 480					
989																
990																
991																
992																
993																
MOU																
Required years of contract		1														
\$MOU																
Retail Operations		Access Resellers			Access MVU*			Access			Gov't Use			Access		
60	120	480	Charge	60	120	480	Charge	60	120	480	Charge	60	120	480	Charge	
989																
990																
991																
992																
993																

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Required years of contract		2															
Number of units																	
Retail																	
Operations		Resellers			MVU*			Govn't Use									
DU	0 - 60	61 - 120	121 - 480	0 - 60	61 - 120	121 - 480	0 - 60	61 - 120	121 - 480	0 - 60	61 - 120	121 - 480					
989																	
990																	
991																	
992																	
993																	
MOU																	
Required years of contract		2															
SMOU																	
Retail																	
Retail Operations		Access		Resellers		Access		MVU*		Govn't		Access		Govn't Use		Access	
	60	20	480	Charge	60	120	480	Charge	60	120	480	Charge	60	120	480	Charge	
989																	
990																	
991																	
992																	
993																	

Form 6

I.93-12-007 TRP/rmn

CERTIFICATE OF SERVICE

I certify that I have by mail this day served a true copy of the original attached Administrative Law Judge's Ruling Directing Parties to Provide Supplemental Information on all parties of record in this proceeding or their attorneys of record.

Dated April 11, 1994, at San Francisco, California.

/s/ RHONDA M. NASU  
Rhonda M. Nasu

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number of the service list on which your name appears.

## **APPENDIX B**



BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's )  
Own Motion into Mobile Telephone ) I.93-12-007  
Service and Wireless Communications. )  
\_\_\_\_\_)

**ADMINISTRATIVE LAW JUDGE'S RULING**  
**DIRECTING PARTIES TO PROVIDE FURTHER SUPPLEMENTAL INFORMATION**

On April 11, 1994, an Administrative Law Judge ruling was issued directing parties to provide supplemental information in connection with the Commission's Order Instituting Investigation (OII) of Mobile Telephone Service and Wireless Communications. As noted in the April 11 ruling, the OII explained that upon receipt of parties filed comments, "[t]he Commission may issue interim rulings or decisions to guide parties for further comments...." Upon further review of parties' comments, additional data requirements have been identified. In accordance with the directive of the OII, this interim ruling directs the cellular carriers identified in the April 11 ruling to provide further information. The additional information requested below is required to assess the claims of industry competitiveness, as asserted in the filed comments.

IT IS RULED that each cellular carrier identified in the April 11, 1994 ruling in Item A shall provide the following information by May 16, 1994 for those same Metropolitan Statistical Areas and Regional Statistical Areas designated in the April 11, 1994 ruling for each year 1989-1993:

Provide the total number of cell sites that have a Capacity Utilization Rate (CUR) within the range described below. CUR for the purpose of this data request is defined as the ratio of the average busy hour (BH) capacity in Erlangs to designed capacity in Erlangs for each cell site. Average BH capacity for this purpose is to be determined by finding the average of the